PAGE

Section 24 ..... 33, 44
Section 26 ..... 33, 45
Section 27 ..... 33, 46
Section 28 ..... 33, 46
Section 29 ..... 33, 46
Section 31 ..... 33, 46
Section 33 ..... 37, 47
Section 34 ..... 33, 48
Section 35 ..... 33, 34, 49
Section 35a 34, 51
Section 36 ..... 34, 51
Section 40 51
Section 41 53
Section 43 ..... 34, 53
Section 46 ..... 34, 54

TREASURY REGULATIONS.

Regulations 74, Art. 643 6

Supreme Court of the United States

OCTOBER TERM 1936.

No. 451.

WILLIAM WHITLOCK BRUSH,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Motion For Leave To File Brief as Amicus Curiae.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for Thaddeus Merriman and Herman Goldberg moves this Honorable Court for leave to file the accompanying brief in this case as Amicus Curiae.

J. JOSEPH-LILLY,
Counsel for Thaddeus Merriman
and Herman Goldberg,
Amicus Curiae.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1936.

No. 451.

WILLIAM WHITLOCK BRUSH,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

SIRS:

You will please take notice that the foregoing motion will be presented to the Supreme Court of the United States at a session thereof appointed to be held at the Court House of the Supreme Court of the United States in the City of Washington, D. C. on Monday the 11th day of January, 1937, at the opening of Court on that day, or as soon thereafter as counsel can be heard.

Dated, New York, January 7th, 1937.

Yours &c.,

J. JOSEPH LILLY,
Counsel for Thaddeus Merriman
and Herman Goldberg,
Amicus Curiae,
Office & P. O. Address,
68 William Street,
New York City, N. Y.

To:

Boykin C. Wright, Esq.
Attorney for Petitioner,
63 Wall Street,
New York City, N. Y.

The Solicitor General,
Department of Justice,
Washington, D. C.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1936.

No. 451.

WILLIAM WHITLOCK BRUSH,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Defendant.

Brief As Amicus Curiae.

Preliminary Statement.

Counsel for the petitioner, and the Solicitor General as counsel for the respondent, have consented in writing to the filing of this brief. Its bulk is due to the addition thereto (*infra*, pp. 39-54) of an Appendix which sets forth the important provisions of the statute of the State of New York under which the Board of Water Supply of the City of New York functions and operates.

The reason why the undersigned desires to file a brief as amicus curiae herein is that, as attorney for Thaddeus Merriman and Herman Goldberg, he has pending, in the United States Circuit Court of Appeals for the Second Circuit, three cases involving facts and questions of law similar to those involved in the above entitled cause, which will be seriously affected by this Court's decision herein.

The petitioners in the United States Circuit Court of Appeals for the Second Circuit, represented by the undersigned, are, respectively, the retired Chief Engineer and one of the Assistant Engineers of the Board of Water Supply of the City of New York upon whose official salaries for the years 1931 and 1932 Federal income taxes were imposed under the purported authority of section 22 of the Revenue Act of 1928 (45 Stats. L. 791) and Article 643 of Treasury Regulations 74.

The question involved in the undecided cases wherein the petitioners, represented by the writer in the said Circuit Court of Appeals, are concerned is whether their annual salaries as employees of the Board of Water Supply of the City of New York, are subject to Federal income tax.

It is and was the contention of the writer, and of the said petitioners, that such salaries are not and were not subject to Federal income tax.

It is also the writer's contention that, if the above entitled case was correctly decided, nevertheless, his clients' salaries are, for the reasons shown in Point V of this brief (*infra,* p. 29), not taxable by the Federal government. This contention is, however, secondary to the basic contention, urged by the above named petitioner, that when a city supplies itself and its inhabitants with water the work is governmental in character and, in all respects, exempt from interference of any kind, on the part of the United States Government, by taxation either of its operations or its personnel.

Reported Below.

The case at bar is reported in the Circuit Court of Appeals at 85 F. 2d 32.

Summary of Argument.

POINT I. When a city, under authority of its State, constructs, maintains and operates a public water supply system it exercises a necessary and indispensable attribute of sovereignty.

POINT II. The precedents relied on by the Court below do not support its conclusion.

POINT III. The better considered decisions support the view that the official salary of the petitioner is not subject to Federal income taxation.

POINT IV. The condition of things, at the time when the Constitution of the United States was framed, precludes the notion that the salaries of officers or employees of municipal water plants or projects are subject to Federal income taxation.

POINT V. In the unlikely event of a determination of this appeal, adversely to the petitioner, the decision should maintain the exemption from Federal income taxation of the salaries of the officers of, and the employees under, the Board of Water Supply of the City of New York, whose work neither produces nor contemplates any revenue to the city.

POINT I.

When a city, under authority of its State, constructs, maintains and operates a public water supply system it exercises a necessary and indispensable attribute of sovereignty.

Water is one of God's greatest gifts to man. Industry cannot produce it in quantities equal to his needs. IT CANNOT BE CULTIVATED OR MANUFACTURED like groceries or clothing or machinery. It is like air, and only secondary to air, an indispensable necessity without which man and such tremendous things as nations cannot exist.

In New York this factual situation is recognized by Article VII, Section 7 of the State Constitution, which wholly excludes private enterprise and concedes only three per centum of the "wild forest lands" of the State for the "construction and maintenance of reservoirs for municipal water supply" and other public water purposes. (See *Kenwell* v. *Lee*, 261 N. Y. 113, *infra*, p. 35.)

We are authoritatively told that

> "**No higher police duty** rests upon municipal authority than that of **furnishing** an ample supply of pure and wholesome water for public and domestic uses. The preservation of the health of the community is best obtained by the discharge of this duty, to say nothing of the preservation of property from fire, so constant an attendant upon crowded conditions of municipal life."
>
> *Columbus* v. *Mercantile Trust & D. Co.*, 218 U. S. 645, 658;
>
> *Montana Water Co.* v. *City of Billings*, 214 Fed. 121, 125;

City of La Follette v. *La Follette Water L. & Tel. Co.*, 252 Fed. 762, 768;
Greeson v. *Imperial Irr. Dist.*, 59 F. 2d 529, 532;
Matter of Village of Massena v. *St. Lawrence Water Co.*, 126 Misc. 524, 529.

As though to remove any doubt that it regarded municipal water supply as one of the most important of the governmental functions of a city, this Court in the *Columbus* case followed its above quoted language by saying:

> "If a municipality elect to contract with another for the discharge of this FUNCTION, it is under the greatest obligation to require that the contractor shall engage to construct and maintain adequate means and furnish an adequate supply to at all times meet the PUBLIC NECESSITY."

Who can doubt that,

> "The supply of water to the general public in a city has become not only a luxury, but an absolute necessity for the MAINTENANCE OF THE PUBLIC HEALTH AND SAFETY."*

Health Department v. *Rector*, 145 N. Y. 32, 48.

Certainly not this Court, because in *Dunbar* v. *City of New York*, 251 U. S. 516, 518, it said:

> "A city without water would be a desolate place, and if plaintiff's property was in such situation it would partake of the desolation. And, as a supply of water is necessary, it is only an **ordinary and legal**

---

* In Kansas *v.* Colorado, 185 U. S. 125, 142 the same doctrine was pronounced the Court saying:

> "Substantial impairment of the health and prosperity of the towns and cities of the state * * * including its commercial metropolis would injuriously affect the entire state."

> **exertion of government** to provide means for it
> compulsory compensation."

In *New Orleans Water Works* v. *New Orleans,* 164 U. S
471, 481, this Court emphatically held that the adoption b
the defendant city of ordinances relative to the supply o
water to certain of its inhabitants was an exertion of legis
lative power with which no court could interfere in advance

In *Asher* v. *Water Co.,* 66 Kan. 496, 500 the Court indi
cated that:

> "The power to own or otherwise provide a syster
> of waterworks, conferred upon cities, has relation t
> public purposes, and for the public and appertains t
> the corporation in its political or governmenta
> capacity."

Similar doctrines were enunciated in

> *Ice, Light & Waterworks Co.* v. *City of Lak*
> *Charles,* 106 La. 65, 69,

and,

> *Ellenwood & ors* v. *City of Reedsburg & ors,* 9
> Wis. 131, 134.

In *Blade* v. *La Conner,* 167 Wash. 403, 407, the Cou
pointed out that in adopting a plan for the acquisition of
water plant the defendant town

> "was exercising its legislative power."

In *New Orleans* v. *Morris,* 105 U. S. 600, 602, 604, th
Court emphasized that waterworks owned by a city ar
held in trust for its citizens and are not liable to sale unde
execution for ordinary debts against the city. In othe

words, cities own and hold their waterworks precisely as they do court houses, police stations, fire houses and city halls, *i. e.*, as governmental properties, which bear no legal resemblance whatever to such private places as liquor or tobacco stores.

A careful examination of the cases decided in this Court and the highest courts of the several states fails to reveal a single instance where the right of a State to supply its citizens, its municipalities and institutions with water was regarded as anything short of an attribute of sovereignty.

The United States Government has, under its constitutional power to govern the District of Columbia, exercised this power by owning and controlling the water supply system of the District of Columbia (Tindall—Origin and Government of the District of Columbia, p. 202), and its legislative branch has recognized that a public supply of water is

> "necessary for the public safety, health, comfort or convenience"

by its

> "'*Act authorizing the laying of water mains and service sewers in the District of Columbia, the levying of assessments therefor and for other purposes (*id.*, p. 155, 33 Stats. L. Pt. 1, p. 244).

In like manner the executive branch of the Federal Government has recognized the essentially governmental nature of public water supply by holding that

> "The reservoirs, aqueducts and other constructions appurtenant to the water supply of the city of Washington, D. C. are to be considered NEEDFUL BUILDINGS within * * * "

the meaning and intent of Article I, Section 8 of the Constitution of the United States.

26 O. A. G. 289, 1 Military Laws of the United States (1921), §1074, p. 592, W. D. Doc. 978.

It is not to be doubted that in acquiring, operating and maintaining a water supply for the District of Columbia the Federal Government has acted within the fair and reasonable scope of its expressed constitutional powers. In so doing it merely discharged one of the classic functions of government.

> "Administrative law, in the more specific sense of the term deals with such topics as the following:
>
> * * * * * * *
>
> V. The promotion of the material welfare of all the individuals of whom the State is composed, either by the prevention of evil or the production of good. Among the operations carried on by State functionaries for this purpose are the following:
>
> I. Measures of sanitary precaution, such as * * *; THE SUPPLY OF PURE WATER, * * *."
>
> Holland—The Elements of Jurisprudence (13th Ed.) Ch. XVI, pages 375, 376.

In the same paragraph, Holland points out

> "that much of this work, except in very highly centralised States is entrusted to local authorities * * *."

German Alliance Ins. Co. v. *Home Water Supply Co.*, 226 U. S. 220, 227, 228, held that in furnishing water for fire protection a municipality acted in a governmental capacity. No one can be found to dispute this statement. But it is obvious that a city cannot exercise this governmental function without having first located the water and made it available for use by the city.

Harms v. *District of Columbia,* 256 U. S. 650, held that the sprinkling of streets to keep down dust for the purpose of the comfort and health of the general public, was a public or governmental act as contradistinguished from a private or municipal act. How the supply of water for this "public or governmental act" could be made a "private or municipal act" was not attempted to be shown in this case. With even the most slight respect for the decisions cited at pages 8, 9, and 10 of this brief the Supreme Court could not have arrived at any other conclusion than that to which it came in this case.

In *Tillman* v. *District of Columbia,* 29 F. 2d, 442, 443, it was also held that in installing, maintaining and controlling a water sprinkler or shower on one of the public streets of the City of Washington, the defendant was performing a governmental service.

A governmental service cannot be performed without the means with which to perform it, and water is the *sine qua non* for the discharge of the services classed as governmental in the two cases just discussed.

Streets cannot be sprinkled without water, nor can public showers be maintained or operated, without the same essential element, to relieve the public suffering and maintain the public health.

> "The construction of sewers and drains is a public governmental function."
>
> *Davis* v. *Commissioner of Sewerage,* 13 F. Supp. 672, 678.

What is the use of a sewer or a drain if it has no water with which to make it function?

> "The importance of fire extinguishing and prevention of the spread of fire is more than a private concern. It has become a governmental function."
>
> *American La France Fire Engine Co.* v. *Riordan,* 6 F. 2d, 964, 966.

Fires are not extinguished by fire engines but by the water which they pour on a conflagration; and it is absurd to say that while a manufacturer of fire engines sold to municipalities and volunteer companies, is exempt from excise taxes, the municipal employees, such as the petitioner, who furnish and maintain (*infra,* p. 24) the supply of water used in extinguishing fires, must pay a Federal income tax on their salaries.

The supply of water is not a mere commercial enterprise where States and their municipalities take the concern upon themselves. It is, then, not a mere adjective matter of

> "the public safety, health, comfort or convenience" (see *supra,* p. 11).

It is a matter of life or death to the State, where, as this Court recognized in *New Jersey* v. *New York,* 282 U. S. 336, 342,

> "the alternative to settlement is war."

A State that, either directly or through its municipalities, cannot supply its inhabitants with the second necessity of life is not a sovereign. It may be some sort of ineffectual satrapy; but it is not the unlimited sovereign in the determination of questions as to whether it would survive or perish which the Tenth Amendment contemplated. (*Collector* v. *Day,* 11 Wall. 124; *Kansas* v. *Colorado,* 206 U. S. 46; *Connecticut* v. *Massachusetts,* 282 U. S. 660.)

POINT II.

The precedents relied on by the Court below do not support its conclusion.

These cases are enumerated at page 49, folios 146-147, of the transcript of record. They are discussed in the order in which the Circuit Court of Appeals, below, mentioned them.

Flint v. *Stone Tracy Co.*, 220 U. S. 107 (R. 49, fol. 146), involved no question of income taxation (*Commissioner of Internal Revenue* v. *Sherman*, 69 F. 2d 755, 756) and determined nothing more than that income from tax exempt municipal bonds was subject to a federal franchise tax, measured by the entire net corporate income. (*Educational Films Corporation of America* v. *Ward*, 282 U. S. 379, 389.) The case also determined that the Coney Island and Brooklyn Railroad Company and the Interborough Rapid Transit Company were not exempt from federal corporation tax because they were public service corporations. Neither the City of New York nor any of its departments or agencies is a public service corporation. The observation at page 172 of the opinion in the *Stone-Tracy* case that,

> "It is no part of the essential governmental functions of a state to provide means of transportation, supply artificial light, water and the like",

was pure dictum,* not at all related to any question the Court was called upon to decide, and utterly opposed to this

* This is made clear by the two sentences following the above quotation where the Court said that *private companies* engaged for profit in the businesses mentioned stood on the same footing for tax purposes as other private corporations.

Court's opposite pronouncements in *Columbus* v. *Mercantile Trust Co.* (*supra*, p. 8) and *Ashton* v. *Cameron County Water Improvement District No. One*, 298 U. S. 513.

Canavan v. *City of Mechanicville*, 229 N. Y. 473 (R. 49, fol. 146) did not involve any question of taxation. The question there involved was:

> "Does a city which for a compensation supplies water through a water pipe to a building there to be used by an inhabitant, impliedly warrant that the water is wholesome and fit for human consumption" (s.c. 190 App. Div. at pp. 253, 254).

The holding of the Court of Appeals was (229 N. Y. at pp. 476-477):

> "that a private water company or a municipality is not an insurer nor liable as a guarantor of the quality of the water it furnishes to its customers in the customary means of pipes and faucets, and cannot be held liable for injuries caused by impure water furnished by it unless it knew or ought to have known of the impurity; its duty is that of exercising reasonable and commensurate care and diligence in providing an adequate supply of water at all times."

The *Canavan* case indicates a tremendous difference between municipal water supply cases and such cases as *Ohio* v. *Helvering*, 292 U. S. 360, where it was said that (p. 369):

> "When a state enters the market place seeking customers it divests itself of its quasi-sovereignty pro tanto and takes on the character of a trader, so far at least, as the taxing power of the federal government is concerned."

In the supply of water to itself for its indisputably governmental purposes, and to its inhabitants for their use and

consumption, a municipality does not enter the market place.*

What it delivers or is ready to deliver to its inhabitants, is not subject (Greater New York Charter Sec. 469) to competitive selling (*Beardsley* v. *Nieblo Mfg. Co. Inc.*, 231 App. Div. 152, 157), as is the sale of alcoholic beverages (*Ohio* v. *Helvering*, 292 U. S. 360, *South Carolina* v. *U. S.*, 199 U. S. 437) or tobacco (*Liggett & Myers Tobacco Co.* v. *U. S.*, 13 F. Supp. 143).

Matter of Water Commissioners of White Plains, 176 N. Y. 239 (R. 49, fol. 146), decided nothing more than that commissioners of appraisal appointed, pursuant to Chapter 769 of the New York Laws of 1896, in a proceeding to acquire by condemnation all of the property rights and privileges of the appellant water company for the respondent village, were obliged to, and could not do otherwise under the statute, than, appraise the property of the appellant company, including its good will and franchise, at its full value and could not limit their award to an amount contemplated in a contract made by the village trustees with the appellant company, which the village had no statutory authority to make.

The case involved no principle or rule of taxation and is notable only as an illustration of the protection which courts will give to private property.

Armstrong & Latta v. *Philadelphia*, 249 Pa. 39 (R. 49, fol. 146), was an action to replevin tools and machinery, which the court found to be the property of the plaintiffs.

---

* It is more in accordance with the facts of history to say that when a private concern engages in the supplying of water to a community it undertakes to discharge a duty properly belonging to the sovereign.

The defense overruled by the Supreme Court of Pennsylvania, was that the detention

> "was an act by the servants of the city without authority and not in the course of the performance of any duty incident to their office or employment, and that the responsibility for their acts must rest on their own shoulders, and to them the plaintiffs must look for redress."

The case is something of an illustration for the observation made by Judge Symes in *Colorado Central Power Co.* v. *Municipal Power Dev. Co.*, 1 F. Supp. 961, 963 (*infra* p. 19), but it determines nothing as to governmental powers and nothing of any value in a tax case.

Omaha Water Co. v. *City of Omaha*, 147 Fed. 1 (R. 49, fol. 147), did not involve anything having the slightest bearing upon the immunity of municipal instrumentalities and employees from federal taxation. The questions there litigated were the powers of the City of Omaha to make an unalterable contract regarding the rates at which a private contractor would deliver water to private consumers, and whether a city ordinance assuming to reduce such rates violated the contract.

We are not concerned, in the case at bar, with any of the problems that were before the Courts in the cases just discussed. The question, really before the Court in this case, is the ability of the Federal Government to interfere by taxation with the legitimate and proper functioning of the States in caring for and serving what the Congress has, itself, described as

> "the public safety, health, comfort or convenience" (*supra*, p. 11).

There are but three cases which appear to hold that the salaries of engineers or other employees engaged in municipal water supply work are subject to Federal income tax. They are *Blair* v. *Byers*, 35 F. 2d 326, *Denman* v. *Commissioner of Internal Revenue*, 73 F. 2d 193,* and, the case at bar. Each of them ignores the truism that the division of the powers of municipal corporations between those which are denominated public or governmental and those which are described as proprietary or private in character,

> "is, a court made rule in derogation of the fundamental principal that municipal corporations are the creation of the sovereign state. It was first made to enable courts to impose common law liability on municipal corporations for the neglect of their servants, etc., and should not be extended beyond this objective * * *."
>
> *Colorado Central Power Co.* v. *Municipal Power Dev. Co.*, 1 F. Supp. 961, 963.

The rule serves no other purpose than to overcome the ancient holding that governments may not be held to liability for wrong (see Borchard, Government Liability in Tort, p. 258). It does not assume to subject the salaries of municipal employees to Federal taxation or to limit the reserved sovereignty of the States.

The annotation to this Court's opinion in *Burnet* v. *Colorado Oil & Gas Co.*, 285 U. S. 393, which begins at 76 L. Ed. 828, collects and correctly recites all the previous holdings and dicta in the cases, beginning with *Collector* v. *Day*, 11 Wall. 113, where Federal taxation of the salaries of State

---

* Neither the *Blair* nor the *Denman* case was brought up for review by this Court.

officers and employees was mentioned. The first sentence of the note summarizes the decisions, as follows:

> "The taxing power of the Federal Government is impliedly limited by the fact that the Federal Constitution contemplates the perpetual maintenance of the states with their recognized powers unembarrassed and unimpaired by any action of the Federal government. Therefore the rule is well established that the taxing power of the United States does not extend to the means or agencies through which the States perform their inherent governmental functions."
>
> 76 L. Ed. 828 and cases cited.

Blair v. *Byers*, 35 F. 2d. 326 (R. 149, fol. 147) involved a tax upon the income received by the appellee's intestate as the attorney "RETAINED" by the Board of Water Works Trustees of the City of Des Moines during the years 1920-1923. The Board of Tax Appeals found as a fact that during the time of his employment the appellee's intestate was free to engage in other professional work and that his services under his retainer did not appear to be subject to the control of the board of trustees which had retained him. On this, the Eighth Circuit predicated the conclusion that the deceased attorney, unlike the petitioner in the case at bar (Opinion below, R. 44, fol. 132), had not become an officer or employee of the political subdivision, but was an independent contractor whose compensation was not exempt from income tax.

In the case at bar there can be no doubt either under the law (New York Civil Service Law Sec. 2) or the facts (R. 20, fol. 58) that the services rendered by the petitioner to the City were exclusive, although it is not conceded that exclusiveness of service is the sole badge of governmental

employment. The professional staff of the United States Department of Justice, *e. g.*, are not required to abandon private employment, but no one would doubt that they are Federal officers and employees, whose salaries are not subject to State taxation.

Blair v. *Byers* was wrongly decided on its own facts. The Court's legal deductions from the facts found in that case by the Board of Tax Appeals would make it impossible for a municipality to obtain the legal services of a lawyer of distinguished ability, and force it to employ $2500 per year counsel to loaf on work of the highest importance.

Denman v. *Commissioner of Internal Revenue,* 73 F. 2d 193 (R. 49, fol. 147) was an attempt by the executor of the deceased manager of the waterworks system of the City of Des Moines to vacate the income tax deficiencies imposed by the Commissioner of Internal Revenue against the estate of the decedent. The case held flatly, following the same Court's precedent in *Blair* v. *Byers,* 35 F. 2d 326, and citing many irrelevant cases, that the salary of the deceased municipal water works manager was subject to Federal income taxation. In its discussion the opinion in this case, while lavish in the quotation of dictum, passes over in silence the pertinent statements as to the governmental nature of municipal water supply made in *Columbus* v. *Mercantile Trust Co.,* 218 U. S. 645 and the other Federal cases cited above at page 8, and *Dunbar* v. *City of New York,* 251 U. S. 516, *supra,* p. 9. The case was as unwisely decided as *Blair* v. *Byers,* but, being something of a precedent may not be ignored.

The peculiar facts of the Denman case may be said to distinguish it greatly, from the case at bar. There the board of water works trustees were, for all practical pur-

poses, quite independent of the city of Des Moines, and their employees were not employees of the city, but of the trustees only. This independence went so far as to permit the trustees, within a statutory limitation of $350 per mile of main pipe, to make whatever annual charge they deemed proper for the water they supplied to the city for its proper governmental and municipal purposes and the state establishments within the city. No free water was supplied to any person or institution and the accounts, management and control of the water works were kept separate from those of the other city departments. In New York City the water rates fixed by the Commissioner of Water Supply Gas and Electricity for privately owned properties are subject to the approval of the Board of Aldermen (G. N. Y. Charter § 469 sd. 4), which is the legislative power of the City of New York (id. §17), and when paid are forthwith delivered to the City Chamberlain (Code of Ordinances, Cap. 25 §25), who is the receiver of all moneys paid into the treasury of the city (G. N. Y. Charter §151 sd. 5). The Department of Water Supply does not charge, and has no power to fix any charge against the City for the water it consumes.

None of the cases upon which the Court below relied, as we have shown above, involved the right of the Federal government to impose income taxes upon the salaries of municipal employees engaged in the work of water supply except the Blair and Denman cases, which were wrongly decided by the Eighth Circuit. Such work is, as the Congress declared it to be,

> "necessary for the public safety, health, comfort or convenience" (*supra*, p. 11),

and, as such, beyond the Federal taxing power.

POINT III.

The better considered decisions support the view that the official salary of the petitioner is not subject to Federal income taxation.

The most authoritative decision of this Court for the purposes of this appeal is *Ashton* v. *Cameron County Water Improvement District No. One*, 298 U. S. 513.* There, the respondent water improvement district, filed a petition and plan, under sections 78, 79 and 80 (48 Stats. L. 798) of the Bankruptcy Act of 1898 as amended by the Act of May 24, 1934, for a readjustment of its outstanding bonds. This Court held that:

> "the respondent [water improvement district] is a political subdivision of the State, created for the local exercise of her sovereign powers * * *. Its fiscal affairs are those of the State, not subject to control or interference by the National Government, unless the right to do so is definitely accorded by the Federal Constitution" (pp. 527-528),

and further (p. 532):

> "that the taxing power of Congress does not extend to the States or their political subdivisions."

As recently as January 4, 1937, this Court held, in *People of the State of New York, ex rel., Rogers* v. *Graves, et al.* (No. 139, October Term, 1936, not yet reported), that the Panama Railroad Company, a New York corporation, acquired and utilized by the Federal government in virtue of its substantive powers under the Constitution, was:

Rehearing denied Oct. 12, 1936, 81 L. Ed. mem. p. 65.

"immune from state taxation,"

and that it followed, necessarily:

> "that fixed salaries and compensation paid to its officers and employees in their capacity as such are likewise immune."

The question in the *Rogers* case was the immunity from taxation by the State of New York of the appellant's salary as general counsel for the Panama Railroad Company. Unless the *Rogers* case was wrongly decided, the petitioner in the case at bar possesses the same immunity from taxation by the Federal government of the fixed salary paid to him by the City of New York as compensation for his services in

> "supervising the maintenance of an adequate supply of pure and wholesome water for the city of New York and its inhabitants" (Opinion below, R. 44, fol. 132).

The affirmed decision of the District Court in the *Ashton* case said that:

> "The reclamation of arid land by irrigation has long been recognized to be a matter of public interest, for the general welfare, and a GOVERNMENTAL FUNCTION."
>
> *In re Cameron County Water Improvement Dist. No. 1,* 9 F. Supp. 103, 105.

Shortly thereafter this Court said:

> "In the arid land states the use of water for irrigation, although by a private individual, is a PUBLIC use."

California Oregon Power Co. v. *Beaver Portland Cement Co.*, 295 U. S. 142, 145.

With the law so firmly established that the reclamation of agricultural land through irrigation is a local exercise of the SOVEREIGN POWER of a State, it is no less true that the forestalling of the desolation that would be the City of New York (see *supra*, p. 9) without an adequate supply of water, which is the exact kind of work in which the petitioner is engaged, is a governmental function, fully as important (see *supra*, p. 8) as that of preventing robbery and murder.

In its epochal decision in *Nebbia* v. *New York*, 291 U. S. 502, 524, this Court pointed out that it had

> "from the early days affirmed that the power to promote the general welfare is inherent in government."

Earlier in *Lake Shore M. S. R. Co.* v. *Ohio ex rel. Lawrence*, 173 U. S. 285, 300, the Court said:

> "The power of the state by appropriate legislation to provide for the public convenience stands upon the same ground precisely as its power by appropriate legislation to protect the public health, the public morals, or the public safety."

The work of maintaining a suitable supply of water for a city is essentially in promotion of the general welfare, the public convenience, health and safety and, as physical cleanliness is generally regarded as an inducement to morality, it may also be said to be in furtherance of the public morals.

We have been told that

> "The creation and maintenance of public parks is a GOVERNMENTAL FUNCTION of a state and its exercise is essential to the health and general welfare of all the citizens of a state."
>
> *Commissioner of Internal Revenue* v. *Sherman*, 69 F. 2d, 755, 759;
>
> *Commissioner of Internal Revenue* v. *Lamb*, 82 F. 2d, 733.

The above cases held that the salaries of a municipal superintendent of public parks and of a secretary of a municipal board of park commissioners were not subject to Federal income taxation. If

> "the creation and maintenance of public parks is a governmental function of a state",

as no one denies, how much more is it a governmental function to supervise the maintenance of an adequate supply of pure and wholesome water for a great city (Opinion below, R. 44, fol. 132) which is the work in which the petitioner is engaged? A city can exist, after a fashion, without parks, but it cannot exist without water. (See cases, *supra*, pp. 8-10).

In addition to the above there are the following cases in which the salaries of various municipal employees were held to be exempt from Federal taxation:

Commissioner of Internal Revenue v. *Harlan*, 80 F. (2d) 660, where it was held that the salary of the attorney for a bridge and highway district could not be taxed.

Halsey v. *Helvering*, 75 F. (2d) 234, where it was held that the salary of a township engineer could not be taxed.

Mallory v. *White*, 8 F. Supp. 989, where it was held that the salary of a physician in a public hospital could not be taxed.

U. S. v. *Kings County*, 281 Fed. 686, where it was held that the county could not be required to collect and pay over to the Federal government the transportation tax imposed by the Revenue Acts of 1917 and 1918.

Jamestown & Newport Ferry Co. v. *Commissioner of Internal Revenue*, 41 F. (2d) 920, where it was held that the stock of the ferry company, owned in its entirety by the town of Jamestown, R. I., was not subject to Federal income tax.

Hoskins v. *Commissioner of Internal Revenue*, 84 F. (2d) 627, where it was held that the salary of the Superintendent of cafeterias of the Fort Worth public schools was exempt from Federal taxation.

There is also *Indian Motorcycle Co.* v. *U. S.*, 283 U. S. 570, 577, where in behalf of a private manufacturer this Court said:

> "the governmental agencies and operations of the states have the same immunity from Federal taxation that like agencies and operations of the United States have from taxation by the states."

In any rational view the petitioner is no less exempt from Federal income taxation than his fellow laborers for the public weal in the city's fire, police and health departments. Indeed, without the labors of the petitioner and his associates, the said strictly police power departments would be worse than ineffective.

POINT IV.

The condition of things at the time when the Constitution of the United States was framed precludes the notion that the salaries of employees of municipal water plants or projects are subject to Federal income taxation.

When the Constitution came into being the wells which supplied the then tiny City of New York with water were publicly owned and publicly operated. So also were the wells in Philadelphia where the convention met. To the fathers of the Constitution, devoted as they were to the study of the Bible and ancient history, it was not news that Athens, Rome, Alexandria, Carthage, Herculaneum, Pompeii, Jerusalem, Paris, Nineveh, Cairo, Heliopolis, Syene, Babylon, Tyre and Sidon, all had municipal water supplies.

Down to very recent years there has been no attempt by the Federal government to reach the salaries of municipal water employees through income taxation. The reason may be found in the fact that in *Metcalf and Eddy* v. *Mitchell*, 269 U. S. 514, 519, the Collector of Internal Revenue did not press his writ of error from the determination of the District Court that the salaries of the plaintiffs respectively as chief engineer of the Kennebec Water District and as a member of the board of engineers of the North Shore sanitary district (299 Fed. 812, 813) were not subject to Federal taxation.

There is not the slightest doubt (Opinion below, R. 44, fol. 13) that the petitioner is one of the

"appointed regular officials of a subdivision of a state" (299 Fed. at p. 813).

Neither can there be any reasonable doubt that the work in which he is engaged was work conducted by the municipal government at the time the Republic was founded and, although tremendously expanded, fully within the contemplation of the founding fathers as a governmental and not a proprietary function of the States.

POINT V.

In the unlikely event of a determination of this appeal adversely to the petitioner the decision should maintain the exemption from Federal income taxation of the salaries of the officers of and the employees under, the Board of Water Supply of the City of New York, whose work neither produces nor contemplates any revenue to the city.

The Board of Water Supply of the City of New York is an instrumentality created by Chapter 724 of the New York laws of 1905. The preamble of the statute describes it as

> "An Act to provide for an additional supply of pure and wholesome water for the city of New York; and for the acquisition of lands or interests therein, and for the construction of the necessary reservoirs, dams, aqueducts, filters, and other appurtenances for that purpose; and for the appointment of a commission with the powers and duties necessary and proper to attain these objects" (2 N. Y. Laws 1905, p. 2027).

The three commissioners who constitute the Board are appointed by the Mayor of the City of New York, are re-

quired to be residents of the city and are prohibited from holding any other public office except that of Notary Public or Commissioner of Deeds (Act §1, *infra*, p. 39).

Section 1 of the statute (*infra*, p. 39) expressly declares the members of the Board to be public officers. Before entering upon the discharge of their duties (N. Y. Public Officers Law §10) they must take the oath of office prescribed by Article VI, Clause 3, of the Constitution of the United States and by Article XIII, Section 1 of the Constitution of the State of New York, and they are removable only for incompetency or misconduct shown after a hearing upon due notice and stated charges (Act §1, *infra*, p. 40). In this respect their tenure of office is rather similar to that of their subordinates who are veterans or exempt volunteer firemen (N. Y. Civil Service Law, §22, sd. 1).

The Board is authorized to select and appoint a secretary, and such engineers, surveyors, draughtsmen, stenographers, clerks and employees as may be necessary, and to fix their compensation (Act §1, *infra*, p. 39). The attorney at law and legal adviser of the Board is the Corporation Counsel of the City of New York (Act §1, *infra*, p. 39) who is the head of an administrative department of the city (Greater New York Charter §§96, 98) and the attorney and counsel for the city, its boards, departments and officers (*id.* §255).

The Board's subordinates of the various grades are "so far as is practicable" in the "competitive" (Cons. N. Y. Art. V §6) civil service of the City of New York (N. Y. Civil Service Law §2).

These employees, apart from those who are additionally protected by veterans' legislation, are removable only for cause (N. Y. Civil Service Law, §22, as last amended by L.

1924, Ch. 612, Greater New York Charter, §1543), and may not be required to do or perform any service or work outside of their public employment (Greater New York Charter §1561). They have all the rights of civil service standing, priority of service and preference for reinstatement (N. Y. Civil Service Law §31, as last amended by L. 1936, Ch. 562) enjoyed by other civil employees of the State of New York and its municipalities and are entitled to become members of the New York City Employees Retirement System (Greater New York Charter, §1700).

In briefest summary, so far as pertinent upon this inquiry, the duties, rights and powers of the Board of Water Supply of the City of New York, are:

1. To appoint one of its own members as President of the Board and adopt a seal and by-laws for the transaction of its business (Act §1, *infra*, p. 39).

2. To select and appoint the Board's subordinates of all ranks and fix their compensation (Act §1, *infra*, p. 39).

3. To ascertain what sources exist and are most available, desirable and best for an additional supply of pure and wholesome water for the city (Act §2, *infra*, p. 40).

4. To make such surveys, maps, plans, specifications, estimates and investigations as it may deem necessary for the purposes of its creation and report them to the Board of Estimate and Apportionment with recommendations as to action to be taken, so that the two boards may be able to determine from what source or sources and in what manner the City of New York may obtain an additional supply of pure and wholesome water (Act §2, *infra*, p. 40).

5. To make such special studies, investigations, recommendations and reports with regard to the water supply of the city or its delivery and distribution among the boroughs as the Board of Estimate and Apportionment may deem advisable (Act §2, *infra*, p. 40).

6. Upon modification or rejection, in whole or in part, by the Board of Estimate and Apportionment of its recommendations or reports to prepare and submit to the Board of Estimate and Apportionment further reports, surveys, maps, plans, specifications, estimates and investigations and to continue so to do, under the direction of the Board of Estimate and Apportionment, until a map, plan or plans contemplated by the statute, shall have been approved and adopted by the Board of Estimate and Apportionment (Act §3, *infra*, p. 41).

7. To enter upon any land or water for the purposes for which the Board exists (Act §4, *infra*, p. 42).

8. To prepare, reprepare, submit and resubmit, in specified form, to the Board of Estimate and Apportionment, maps of the proposed sites, dams, reservoirs, aqueducts and other works of construction and the appurtenances thereof until the works proposed by it shall have been finally approved by the Board of Estimate and Apportionment (Act §5, *infra*, p. 42).

9. After payment or deposit by the city of one-half of the assessed valuation of land included within a condemnation to enter upon, use and occupy it for the purposes of constructing and maintaining upon it the works and appurtenances contemplated by the statute (Act §11, *infra*, p. 44).

10. To make agreements for the compensation of the private owners of realty included in an approved plan, and with the proper officers of the State for the acquisition of lands owned by the State (Act §24, *infra*, p. 44).

11. To determine, prepare and submit to the Corporation Counsel for approval as to form, forms of contracts and specifications for the doing of all or part of the work and the furnishing of all or part of the material, required by an approved plan (Act §26, *infra*, p. 45).*

12. With unimportant exceptions (Act §34, *infra*, p. 48), to advertise for sealed bids or for proposals for the doing of the work or the furnishing of the materials called for in an approved contract (Act §27, *infra*, p. 46).

13. To receive bids or proposals for work or material (Act §28, *infra*, p. 46).

14. To accept the best bids or proposals in response to its advertisements or, if so advised, to reject all bids and readvertise, and to relet all abandoned or terminated contracts (Act §29, *infra*, p. 46).

15. To direct, supervise and inspect the doing of all work and the furnishing of all materials on contracts let by it (Act §31, *infra*, p. 47).

16. To build, construct, repair and maintain such additional highways and bridges as may be made necessary by the construction of any reservoir (Act §35, *infra*, p. 49), and make rules and regulations to prevent improper and

---

* The Board of Water Supply differs from the administrative departments of the city (Greater New York Charter § 96) in that the Corporation Counsel does not prepare the contracts which it makes (id. § 255).

destructive use of such highways and bridges (Act §35a, *infra,* p. 51).

17. To provide police protection to the localities in which it is constructing work and for that purpose to appoint and remove uniformed police officers, who are peace officers (Act §35, *infra,* p. 49).

18. To provide itself with such suitable offices, furniture, safes, supplies and conveniences as may be suitable and proper to enable it to perform its duties (Act §44, *infra,* p. 53).

19. To file a monthly report with the Comptroller of the City of New York of all its expenses and liabilities for the preceding month (Act §36, *infra,* p. 51).

20. In addition to the powers specifically conferred to have such further powers as may be requisite to the efficient performance of the duties imposed upon it by the statute (Act §1, *infra,* p. 39).

No step looking to the acquisition by the city of lands for its water supply may be taken, under the statute, unless the maps and plans prepared by the Board of Water Supply and adopted by the Board of Estimate and Apportionment (Act §3, *infra,* p. 41) shall have been submitted to and approved by the State Water Supply Commission (Act §46, *infra,* p. 54).

This last mentioned body was erected by Chapter 723 of the New York Laws of 1905. It is now known as the Water Power and Control Commission (N. Y. Conservation Law §613, sd. 1, as amended by L. 1928, Ch. 242, §39), and its general powers over the water supplies of the munici-

palities* of the State are continued in Section 521 of the Conservation Law of the State of New York.

From the above and the statute (*infra*, p. 39 *et seq.*) under which it exists, it is patent that the members of the Board of Water Supply of the City of New York and their subordinates are not engaged

> "in supplying to the public for a direct charge, what it could, and otherwise would, procure from private sources"

(Opinion below R. 47-48, fols. 141-142).

THE BOARD OF WATER SUPPLY NEITHER REALIZES NOR HANDLES ANY MONEY. NEITHER DOES IT DELIVER ANY WATER EITHER TO THE CITY OF NEW YORK OR TO ANY OTHER PERSON, MUNICIPALITY, AGENCY OR CORPORATION.

It has no authority to do any of these things.

For all practical purposes its functions are ended as the work of construction on each water project is completed and before any water from it is supplied or distributed.

The agency of the City of New York, which has jurisdiction, charge and control

> "1. Of all structures and property connected with the supply and distribution of water for public use, except as the same shall be owned by private corporations, including all fire and drinking hydrants and all water meters.

---

* For the purposes of its water supply legislation a municipal corporation of the State of New York is a county, town, school district, village, city or other territorial division of the State, established by law with powers of local self-government. The term does not include a water district (Kenwell *v.* Lee, 261 N. Y. 113, 117).

> 2. Of furnishing the water supply and maintaining its quality, and of all work necessary to deliver the proper and required quantity of water with ample reserve for contingencies and future demands.†
>
> 3. Of the collection of the revenues from the service, sale or use of water from the public water supply.*
>
> 4. Of making and enforcing rules and regulations governing and restricting the use and supply of water * * *",

is its Department of Water Supply, Gas and Electricity (Greater New York Charter, §469 as amended by L. 1916, Ch. 602, §1), one of the administrative departments of the City of New York (Greater New York Charter, §§96, 100, 468).

The expenses of, or incurred by or through, the Board of Water Supply for salaries, acquisition of real estate, construction of works and for all other purposes are **not** *included in the*

> "budget of the amounts estimated to be required to pay the expenses of conducting the public business of the City of New York * * * for the then next ensuing year * * *" (Greater New York Charter, §226),

———".

† Not even the Treasury Department will assume to say what would be an ample reserve for contingencies such as a huge conflagration, pestilence or other public calamity.

* Charges for water from the public supply are liens against the lands and buildings supplied, of the same grade as real property taxes (Greater New York Charter §§473, 1017). The duty of collecting these charges was transferred by New York City Local Law No. 14 of 1928 to the Comptroller who is the head of the city's department of finance (Greater New York Charter § 67).

but, under the authority and direction of section 33 of the Act (*infra*, p. 47) creating the Board, are paid by the Comptroller of the City of New York through the sale of corporate stock of the city.

"Corporate stock of the city of New York" are the bonds issued by the City of New York on and after January 1, 1898 for the redemption and payment whereof

> "the faith and credit of the City of New York shall be and is hereby pledged. * * * and shall be made redeemable at a period of not more than fifty years from the date thereof * * *." (Greater New York Charter, §169.)

When issued under section 33 of the Act creating the Board of Water Supply of the City of New York (*infra*, p. 47), these obligations are

> "bonds to provide for the supply of water within the meaning of section ten of article eight of the constitution of the state of New York" (*infra*, p. 48),

and are "not included" in the prohibition which said section of the State Constitution makes against the incurrence by any county or city of the State of further indebtedness, after January 1st, 1908, in excess of

> "ten per centum of the assessed valuation of the real estate of such county or city subject to taxation, as it appeared by the assessment rolls of said county or city on the last assessment for State or county taxes * * *."

No activity of the Board of Water Supply of the City of New York looks to the acquisition or earning by it of any moneys for the City or for itself. By it and through

it, staggering amounts of the public moneys are expended. But it gains nothing for the public revenues. Its principal functions are to investigate, to study, to supervise, to police and to inspect. It is possible for the Board to spend millions of dollars of the city's money without more result to the city than that gained by a fire company, not called upon to answer an alarm of fire. Nothing that is done by it is anything short of governmental in its nature, and the salaries of its officers and employees should, therefore, be recognized as free from taxation by the Federal Government.

Conclusion.

The order herein of the United States Circuit Court of Appeals should be reversed and the tax on the petitioner's salary be set aside, but, if that be not done, it should be indicated that the salaries of the officers and subordinates of the Board of Water Supply of the City of New York are not subject to Federal income taxation.

Respectfully submitted,

J. Joseph Lilly,
Attorney for Thaddeus Merriman
and Herman Goldberg,
Amicus Curiae.

Appendix A

New York Laws of 1905, Chapter 724

Section 1. The mayor of the city of New York shall appoint three persons who shall be commissioners for the purposes hereinafter specified. The persons so to be appointed shall be public officers and shall constitute a board or commission to be called the board of water supply of the city of New York. Every member of this board shall during his term of office be a resident of the city of New York. Each of the commissioners shall be entitled to receive a salary of twelve thousand dollars per year and shall hold no other federal, state or municipal office, except the office of notary public or commissioner of deeds. The board shall have the power to appoint a president from among its own members and to adopt a seal and by-laws regulating the transaction of its business. The board shall also have power to select and appoint a secretary, and such engineers, surveyors, draughtsmen, stenographers, clerks and employees as may be necessary, and to fix their compensation and in addition to the powers hereinafter specifically conferred shall have such further powers as may be requisite to the efficient performance of the duties imposed upon it by this act. Two members shall constitute a quorum of said board for the transaction of all business of the board. All contracts and other papers to be executed pursuant to a resolution adopted by the board, may be executed in the name of the board, and under its seal and attested by the signature of its president or secretary or of any member of the board duly authorized by resolution so to do. The corporation counsel of the city of New York shall be the attorney at law for, and legal adviser of, the board, and shall, upon its request, either personally or through such of his assistants or other counsel as he may designate, furnish it with advice and aid, in a similar manner as he

is required by law to do in the case of the departments, boards and officers of the city of New York.* No member of said board shall be removed except for incompetency or misconduct shown after a hearing upon due notice, upon stated charges.

SEC. 2. It shall be the duty of the board to proceed immediately and with all reasonable speed, to ascertain what sources exist and are most available, desirable and best for an additional supply of pure and wholesome water for the city of New York. The board shall make such surveys, maps, plans, specifications, estimates and investigations as it may deem proper in order to ascertain the facts as to the said sources and shall report to the board of estimate and apportionment with recommendations as to what action should in its opinion be taken with reference thereto, so that the board of water supply and the board of estimate and apportionment may be enabled to determine from what source or sources and in what manner the city of New York may best secure an additional supply of pure and wholesome water. It shall not be necessary that the project contemplated by this act shall be acted on by or under one report, or at one time, but it shall be lawful for the said boards to report upon, consider and determine the project in parts or sections from time to time as the said boards may deem fit, so that the city may be able to obtain an additional supply of water from one or more sources before the whole additional supply contemplated may be obtained. If at any time the board of estimate and apportionment shall determine it to be advis-

* This sentence is substantially the same as the one contained in section 255 of the Greater New York Charter which makes the Corporation Counsel, who is the head of one of the administrative departments of the City of New York (Greater New York Charter, §§96, 98) the attorney and counsel for the city, the mayor, the board of aldermen and each and every officer, board and department of the city except as otherwise provided in the charter.

able that the needs of the city with respect to its water supply or with regard to the delivery and distribution of such supply among the several boroughs of the city shall be made the subject of study and investigation, the board of water supply shall forthwith proceed with such studies and investigations and, together with its recommendations, report to the board of estimate and apportionment. Upon receipt of any such report the board of estimate and apportionment may consider and act upon such report in the same manner and with the same authority as provided in this section and in any following sections. (As amended by Section 1, Chapter 314, Laws of 1923.)

SEC. 3. The board of estimate and apportionment upon the receipt of the said report or reports of the board of water supply may adopt, modify or reject the whole or any part of the same, and may cause such surveys to be made, and such further information to be obtained as it shall deem expedient to enable it to act intelligently in the premises. In case of the modification or rejection of the recommendations in said report or reports or any part thereof by the board of estimate and apportionment, the board of water supply in like manner as aforesaid shall prepare and submit to the board of estimate and apportionment a further report or reports, surveys, maps, plans, specifications, estimates and investigations and make such changes and modifications as shall seem proper to the board of estimate and apportionment, and shall continue so to do under the direction of the board of estimate and apportionment, until a map, plan or plans covering the entire work contemplated by this act shall be approved and adopted by the board of estimate and apportionment. The said map, plan or plans may be made and adopted in parts or sections from time to time and may be changed or modified either before or after adoption as the board of estimate and apportionment may deem necessary for the more efficient carrying out of the provisions of this act. • • • A

final map, plan or plans approved and adopted by the board of estimate and apportionment shall be executed in quadruplicate, one of which shall remain on file with the clerk of the board of estimate and apportionment, one shall be placed on file in the office of the board of water supply, one or a certified copy thereof shall be filed in the county clerk's office or register's office of each county in which any of the land affected thereby is situated, and one copy, or a certified copy thereof, shall be filed in the office of the commissioner of water supply, gas and electricity. * * * (As Amended by Section 1, Chapter 314, Laws of 1906.)

SEC. 4. The board of water supply its agents, engineers, surveyors and such other persons as may be necessary to enable it to perform its duties under this act, are hereby authorized to enter upon any land, or water for the purpose of making surveys, examinations or investigations and preparing the maps, plans and reports contemplated by this act, and for the purpose of posting any notices that may be required to be published in like manner.

SEC. 5. After the approval, adoption and filing of a final map, plan or plans described in section three of this act, the board of water supply shall prepare and submit to the board of estimate and apportionment six similar maps or plans of the proposed sites of the proposed dams, reservoirs, aqueducts, sluices, culverts, canals, pumping works, bridges, tunnels, blow-offs, ventilating shafts, filters, and other works of construction and the appurtenances thereof. Upon those maps there shall be laid out and numbered the various parcels of real estate on, over or through which the same are to be constructed and maintained, or which may be necessary for the prosecution of the work authorized by this act, * * *. On said maps the natural and artificial division lines existing on the surface of the soil at the time of the survey shall be delineated, and there shall be plainly indicated thereon of which parcels the fee, and over or

through which parcels the right to use and occupy the same in perpetuity, is to be acquired. The board of estimate and apportionment may adopt, modify or reject said maps in whole or in part and require others to be made instead thereof. The said maps may be made and filed in sections. One or more sections may be determined before the maps of the whole construction are completed. The said sections shall be determined and decided upon previous to the appointment of the commissioners as hereinafter provided for, and shall be so determined that one set of commissioners shall not be appointed upon a section covering more property than can reasonably be passed upon and awards made by said commissioners within the limits of a year from the time of the filing of the oaths, as hereinafter provided. The proceedings hereinafter authorized may in like manner be taken separately in reference to one or more of such sections before the maps of the whole are filed. The work upon one or more of such sections may be begun before the maps of the remaining sections are filed. In case of such rejection the board of water supply shall in like manner, as aforesaid, prepare and submit others, until maps shall be approved by the board of estimate and apportionment covering the entire area required for the construction, maintenance and operation of such aqueducts, dams, reservoirs, culverts, sluices, canals, bridges, tunnels, pumping works, blow-offs, shafts, filters and appurtenances according to the maps, plan or plans, theretofore by the said board of estimate and apportionment approved. The maps when adopted by the said board of estimate and apportionment shall be by said board transmitted to the corporation counsel, with a certificate of such approval written thereon and signed by a majority of the board of estimate and apportionment. (As amended by Section 1, Chapter 525, Laws of 1928.)

SEC. 11. On filing the said oath, in the manner provided in the previous section, the city of New York shall

be and become seized in fee of all those parcels of real estate which are on the maps in the fifth section referred to described as parcels, of which it has been determined that the fee should be acquired; and may immediately or at any time or times thereafter take possession of the same or any part or parts thereof without any suit or proceeding at law for that purpose; provided, however, that before the city of New York takes possession of the same it shall pay to the respective owner or owners of each of said parcels of real estate, a sum of money equal to one-half the assessed valuation of said real property as the same appears upon the assessment roll of the town in which the same is situate for the year next preceding that in which the city of New York becomes seized in fee of each of said parcels of real estate or the city of New York at its option and by agreement with the said respective owner or owners may pay to him or them a sum of money equal to the whole assessed valuation of the said real property as the same appears upon the assessment roll of the town in which the same is situate for the year nineteen hundred and twenty-seven. * * * (As last amended by Section 3, Chapter 525, Laws of 1928.)

SEC. 24. The board of water supply, subject to the approval of the board of estimate and apportionment of the city of New York may agree with the owners and persons interested in any real estate laid down on said maps as to the amount of compensation to be paid to such owners or persons interested for the taking or using and occupying such real estate. And in case any said real estate shall be owned, occupied or enjoyed by the people of this state or by any county, town or school district within this state, such rights, titles, interests or properties may be paid for upon agreement respectively with the commissioners of the land office, who shall act for the people of the state, with a chairman and a majority in numbers of the board of supervisors of any county who shall act for such county,

and with the supervisor and commissioner of highways, of any town who shall all act for such town, and with the trustees of any school district who shall act for such district. The commissioners of the land office shall have power to grant to the said city any real estate belonging to the people of this state, which may be required for the purposes indicated in this act, on such terms as may be agreed on between them and the said board of water supply, always, however, reserving and maintaining the rights of the people and riparian owners to go to the water at any point to which the same may be drawn; and if any real estate of any county, town or school district is required by the city of New York for the purposes of this act, the majority of the board of supervisors acting for such county, or the supervisors of any such town, with the commissioners of highway therein acting for such town, or the trustees of any school district acting for such district, may grant or surrender such real estate for such compensation as may be agreed upon between such officers respectively and the board of water suply.

SEC. 26. Upon the filing of the oath of the commissioners of appraisal in the manner hereinbefore provided, the board of water supply shall, from time to time, as it may determine, prepare and submit to the corporation counsel, forms of contracts and specifications for the doing of the work and the furnishing of the material required to be done and furnished by the said approved plan, or for the doing of such parts of said work and the furnishing of such parts of said materials as it may from time to time determine. The forms of contract, specifications and bonds for the faithful performance shall be subject to approval as to form by the corporation counsel which approval shall be endorsed thereon or attached thereto. The board of water supply is hereby given the exclusive authority to determine what provisions shall be embodied in said contracts.

SEC. 27. When the form of any contract with its specifications and the form of bond for the performance thereof shall have been approved as provided for in the last section, the board of water supply shall advertise for sealed bids or for proposals for the doing of the work or the furnishing of the materials called for in such approved form of contract. Said advertisement shall be published in the City Record and in two daily newspapers published in the city of New York, to be designated by the board of water supply, for at least fifteen days consecutively before the time fixed for the closing of the bid box.

SEC. 28. All bids or proposals which may be sent in answer to the invitation of such advertisement shall be inclosed in a sealed envelope and delivered to the board of water supply or to such person as may be designated by it to receive the same, who shall, upon receipt thereof, forthwith and in the presence of the person offering said bid deposit it in a box provided for the receipt thereof. * * *

SEC. 29. After the expiration of the time limited in the advertisement the said bids or proposals shall be publicly opened by the said board of water supply and it may select the bid or proposal, the acceptance of which will, in their judgment, best secure the efficient performance of the work, or they may reject any or all of such bids. In case of the rejection of all of said bids the said board of water supply shall readvertise said contract, and shall receive and dispose of the bids tendered under such advertisement in the manner hereinbefore provided for. In case any work shall be abandoned by any contractor, or his contract terminated pursuant to the provisions thereof, it shall be readvertised and relet in the manner in this act provided for the original letting of such work.

SEC. 31. The contracts, when so awarded, shall be executed in triplicate by the contractor or contractors on the

one part and the board of water supply acting for the city of New York, on the other part. One of said originals shall be delivered to the contractor, and the other two shall be filed, one in the finance department and the other with the board of water supply. The work and materials called for by said contract shall be done and furnished under the direction and supervision, and subject to the inspection of the board of water supply, its engineers, supervisors and inspectors. No contract shall take effect until the board of water supply or a majority thereof shall certify thereon in writing that its acceptance will, in their judgment, best secure the public interest and the efficient performance of the work therein mentioned. No contract shall take effect until the employer of labor to be engaged in the construction of any of the work in this act provided for, shall give to the municipality in which such labor may be employed, a bond in the penal sum of five thousand dollars condition to save harmless and indemnify such municipality against any loss, expense or charge that said municipality may legally incur because of paupers or indigent employees brought in said municipality and having no settlement therein such bond to be approved by the chief executive officer of such municipality. (As amended by Section 5, Chapter 314, Laws of 1906.)

Sec. 33. The comptroller of the city of New York is hereby authorized and directed to raise from time to time by the issuance of corporate stock of the city of New York, in addition to the amount which he is now authorized to raise for such purposes, such sums of money as shall be sufficient to pay for the salaries of the board of water supply and their subordinates, and for any real estate, or for the extinguishment of any right, title or interest therein acquired, and all damages appraised to persons interested therein, together with all expenses necessarily incurred in surveying, locating and acquiring title to said real estate, or in extinguishing claims for damages thereto and also to

pay for all construction work that may be contracted for and accomplished under this act, and for all other expenses of any nature or kind whatever that may be legally incurred under the provisions of this act. Such corporate stock shall be issued by the comptroller when thereto authorized by the board of estimate and apportionment, without the concurrence or approval of any other board or public body, and as provided in section one hundred and sixty-nine of the Greater New York charter.* Such corporate stock shall be deemed to be bonds to provide for the supply of water within the meaning of section ten of article eight of the constitution of the state of New York,† and in accordance with the provisions of said section a sinking fund shall be created on the issuing of the said corporate stock for its redemption by raising annually by taxation a sum which will produce an amount equal to the sum of the principal and interest of said corporate stock at its maturity. All payments from the proceeds of the sale of such corporate stock shall be made upon proper vouchers and authorizations in accordance with the provisions of this act and with the laws, regulations and practice now in force in regard to the payment of money by the comptroller of the city of New York. (As amended by Section 1, Chapter 438, Laws of 1907.)

SEC. 34. All work hereby authorized to be done and all materials hereby authorized to be furnished involving an expenditure of over one thousand dollars, shall be procured by contract made in the manner required by and

---

* This charter section describes the 50 year bonds of the City of New York and limits the purposes for which they may be issued. The above section 33 extends these purposes to include the operations of the city's Board of Water Supply.

† This is the provision of the Constitution of the State of New York which limits the amount of the indebtedness which may be incurred by any county or municipality, except for water supply and other prescribed purposes.

pursuant to the provisions of this act. The board of water supply, however, may without contract cause such surveys to be made and such maps, plans and estimates to be prepared, as shall, in its opinion, be necessary to carry out the provisions of this act, and may appoint and fix the compensation of suitable engineers and other persons to supervise and inspect all work hereby authorized to be done. The board of water supply may procure any work to be done without contract, not involving an expenditure of over five thousand dollars, if they certify that in their opinion, it is for the public interest, that such work shall be done; and in such certificate they shall state their reasons therefor.

SEC. 35. The city of New York is hereby required to build and construct such highways and bridges as may be made necessary by the construction of any reservoir under this act, and to repair and forever maintain such additional highways and bridges, except such as shall be part of any state route; and in case any bridge or highway thus constructed shall cross any railroad, it shall do so above or below the said railroad and not upon the same level. It shall be the duty of the board of water supply of the city of New York, to provide proper police protection to the inhabitants of the localities in which any work may be constructed under the authority of this act and during the period of construction, against the acts or omissions of persons employed on such works or found in the neighborhood thereof; and to that end the said board is hereby authorized and required to appoint a sufficient number of persons to adequately police the said localities for the said periods. The said board shall also have power to remove such persons and to fix or change their compensation in its discretion, which compensation shall be paid upon a certificate of the said board, by the city of New York, as part of the expense authorized to be incurred by this act.

The said board shall give to each person so appointed a certificate of appointment and certified copies thereof, one of which shall be filed in the office of the sheriff of each county in which any work shall be in process of construction under this act and in which said person shall be authorized to perform his duties. Each of said persons so appointed shall be and have all the powers of a peace officer in the county where any work is being constructed under the authority of this act, and he shall at all times when on duty wear upon his clothing or have in his possession a shield or other suitable badge of authority which he shall at once exhibit to any person asking therefor. It shall be the special duty of the persons so appointed to prevent breaches of the peace and unlawful depredations and to arrest and bring before the proper magistrates persons employed on the said works or found in the vicinity thereof, who are guilty of offenses against the law punishable by death, imprisonment or fines, or persons whom they may have reasonable cause to believe to be guilty of any of such offenses. The sheriff of a county wherein a certificate of appointment of any such person as a peace officer is filed may cancel such certificate for cause, and shall immediately give notice in writing of such cancellation to the board of water supply of the city of New York, specifying the cause of such revocation. Such notice may be given by mail. On such cancellation the authority of such person as a peace officer shall immediately cease. Any expense necessarily incurred by a county, town or city in any criminal action or proceeding against any person employed on any work constructed or in process of construction under this act, or in the suppression of riots among persons employed on said work or in the prevention of the commission of crime by such person, after being duly audited as required by law, shall constitute a claim in favor of such county, town or city against the city of New York, and an action may be maintained on

such audit as for money paid to the use of the city. The plans and specifications for any highways required to be constructed under the provisions of this section shall be approved by the state department of public works. (As last amended by Section 5, Chapter 525, Laws of 1928.)

SEC. 35-a. The board of water supply shall make such reasonable rules and regulations, not in conflict with the highway law of the state of New York, as may be necessary to prevent improper and destructive use of highways and bridges constructed under the provisions of this act; provided, however, that the board of water supply shall have no greater authority in respect thereto, than is now, or may hereafter be, vested by the highway law of the state of New York in the town, county or state authorities in relation to the construction and regulation of town, county and state highways. Any individual or corporation failing to observe such rules and regulations shall be guilty of a misdemeanor and in addition shall be liable for actual damages to said highways and bridges to be recovered by the city of New York. (Added by Section 1, Chapter 478, Laws of 1914.)

SEC. 36. The board of water supply shall in every calendar month file in the office of the comptroller of the city of New York an account of any expenses made by it, or under its authority, and of all liabilities incurred by it during the preceding month and an abstract of each such account shall be published in the City Record.

SEC. 40. Immediately after the passage of this act, it shall be lawful for any of the municipal corporations or water districts in the counties of Ulster, Greene, Delaware, Schoharie, Sullivan, Orange, Westchester and Putnam, to take and receive from any of the reservoirs, aqueducts, conduits, streams or pipes of the city of New York, a supply of water for the uses and purposes of the said munici-

pal corporations or water districts and to that end said municipal corporations or water districts are, and each of them is, authorized and empowered to lay the necessary mains, pipes, valves, hydrants, supply pipes and other necessary appurtenances for the use of said water, without the consent of any board, officer, bureau, or department of the state or any subdivision thereof. The connections with said reservoirs, aqueducts, conduits, streams or pipes shall be made at the expense of said municipalities or water districts, and they shall pay to the city of New York such fair and reasonable water charges or rates as may be agreed upon between the proper officer in charge of the water supply of the city of New York* and the authorities of such municipal corporations or water districts or as from time to time upon the application of either party shall be fixed by the water power and control commission,† which commission is hereby given power to fix such fair and reasonable charges or rates after hearing all parties interested. Such charges or rates shall not, however, exceed the charges or rates now charged by the city of New York to persons using water in that city. Such fair and reasonable charges or rates shall be determined on the basis of the actual total cost of the water to the city of New York after deducting from said total cost all construction costs and expenses of operation, maintenance and carrying charges incurred within the corporate limits of the city of New York in connection with the distribution and delivery of the water within said limits. Such charges or rates fixed by the water power and control commission shall be subject to review by the supreme court. Any such municipal corporation or water district desiring to take and receive water under the provisions of this section shall make appli-

---

* The officer here referred to is the Commissioner of Water Supply, Gas and Electricity of the City of New York (Greater New York Charter, §469, *supra*, pp. 35-36).

† This is the body whose duties and functions are described in the Conservation Law of the State of New York.

cation to the proper officer in charge of the water supply of the city of New York in writing, showing the place and manner in which it is proposed to make said connections, which said officer in charge of the water supply of the city of New York shall have exclusive jurisdiction in the premises, to the exclusion of any other board, officer, bureau or department of the state or any subdivision thereof. It shall be the duty of the said officer to grant a permit or authorization for the said connections, under reasonable rules and regulations, including the installation of proper meters or other devices for ascertaining the quantity of water thus taken. The daily quantity of water which may be taken and received by any municipal corporation or water district under the provisions of this section shall not exceed the quantity calculated by multiplying the number of its inhabitants as shown by the last preceding census of the United States or the last state or official municipal census by the daily per capita consumption in the city of New York. (As last amended by Section 6, Chapter 525, Laws of 1928.)

SEC. 41. It shall be lawful for any municipal corporation or other civil division of the state within the watersheds of Esopus creek, the Rondout creek or the Catskill creek, in the counties of Ulster and Greene, at its own expense, to construct a pipe line or aqueduct connecting with any reservoir constructed therein under the provisions of this act, for the purpose of supplying water to such municipal corporation or other civil division of the state. * * *

SEC. 44. The board of water supply is hereby authorized and empowered to provide suitable offices and conveniences for the transaction of its business and to provide proper and needful furniture and safes for the safekeeping of its documents, and to incur other necessary expenses suitable and proper to enable it to carry out the provisions of this act.

SEC. 46. The city of New York shall have no power to acquire, take or condemn lands under this act unless maps and plans covering the work contemplated by this act shall have been submitted to and approved by the state water supply commission. All amendments or modifications of such maps and plans thereafter made shall be in like manner submitted to and approved by said board, and when so approved, shall have the same force and effect as the original plans filed with said board.